IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JAROSLAV HYPL, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, COREXPRESS, Respondent Employer, SPECIAL FUND DIVISION, NO INSURANCE SECTION, Respondent Party in Interest.	2 CA-IC 2006-0022 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

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JAROSLAV HYPL, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CPS, INC. FOR LEASED WORKERS TO COREXPRESS, Respondent Employer,	

STATE COMPENSATION FUND,)
)
Respondent Insurer.)
)

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim Nos. 20031-390630 and 20030-690035

Insurer No. 02-46949

Thomas A. Ireson, Administrative Law Judge

AWARD AFFIRMED

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H O W A R D, Presiding Judge.

¶1 In this statutory special action, petitioner/employee Jaroslav Hypl challenges the administrative law judge's (ALJ) award in which he concluded that Hypl failed to present sufficient evidence to raise a presumption that his injury arose out of and in the course of employment. Because the ALJ's decision was based on a reasonable theory of the evidence, we affirm the award.

¶2 The undisputed facts, as summarized in our previous opinion in this case, are as follows:

> On May 2, 2002, Hypl accepted a job with Corexpress to transport several barrels of wire from Nogales, Arizona, to El Paso, Texas, a distance of approximately 350 miles. Hypl began the trip at approximately 6:00 p.m. that evening and was instructed to deliver the wire by 6:00 a.m. the next morning. At 6:30 a.m., a half hour past the required delivery time, Hypl was arrested on Interstate 10 near Deming, New Mexico, after a police officer witnessed him driving erratically. At the time of his arrest, Hypl was traveling westbound, *i.e.*, away from El Paso, but had not yet delivered the wire to its destination.
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> Presuming Hypl was intoxicated, the officer took him to a police station for booking. After a closer examination, the officer realized Hypl was injured and sought medical attention for him. Hypl was taken to a nearby hospital where physicians determined that he had a skull fracture on the top of his head, blood clots in the frontal and temporal lobes of his brain, and blood in the surface of his brain. He was transported by helicopter to University Medical Center in Tucson, Arizona, for emergency surgery and remained in a coma for over eight hours after the surgery.

> Hypl filed a claim for workers' compensation benefits, which was denied. Hypl requested a hearing and testified at the hearing that he had no memory of the events that had caused his injury. Although he remembered loading the wire onto the truck in Nogales and driving toward Interstate 10, he recalled nothing else until he awoke from the coma after his surgery. The ALJ determined that Hypl had not met his burden of proving the injury had occurred within the course and scope of his employment. The ALJ further concluded that the "unexplained death presumption" had not been extended in Arizona to an applicant who was alive and declined to extend it in [Hypl's] case. Ultimately, the ALJ found the injury noncompensable. The award was affirmed upon administrative review . . . .

Hypl v. Indus. Comm'n, 210 Ariz. 381, ¶¶ 2-4, 111 P.3d 423, 425 (App. 2005).

¶3 Hypl then brought a statutory special action in this court. *Id.* ¶ 4. We set aside the award, holding that "a presumption similar to the unexplained death presumption should apply to an injury to a living worker who, due to the injury, is unable to testify about how the injury happened." *Id.* ¶ 20. We held that if "Hypl c[ould] provide a sufficient factual basis to allow an inference that he was injured in the time and space limitations of his employment, he [would be] entitled to a presumption that his injury occurred in the course of and arose out of his employment." *Id.* ¶ 21.

¶4 Following our decision, the parties agreed to have the case reassigned to the same ALJ who had issued the first award. The parties agreed not to present any new evidence, and that the sole issue before the ALJ would be whether, in light of our decision in *Hypl*, Hypl had presented sufficient evidence to give rise to the presumption.

¶5 The ALJ determined that "the preponderance of the evidence d[id] not establish [Hypl] was in the time and space limitations of his employment at the time of injury." He therefore concluded that the presumption we discussed in *Hypl* did not apply and that, "[w]ithout a presumption, . . . the preponderance of the evidence d[id] not establish [Hypl] was in the course and scope of his employment at the time of injury or that the injury arose out of the employment." Accordingly, he found the injury noncompensable. The award was affirmed on administrative review, and this statutory special action followed.

¶6 Preliminarily, we address Hypl's motion to strike the answering brief filed by respondent insurer State Compensation Fund (SCF) on behalf of it and respondent/employer CPS, Inc. Hypl includes this motion within his reply brief,[1] arguing that CPS was not Hypl's employer and thus neither CPS nor SCF are proper parties to this action.[2] But Hypl did not raise this issue in his legal memoranda filed with the ALJ or in his opening brief in this special action. Accordingly, it is waived. *See Kessen v. Stewart*, 195 Ariz. 488, ¶ 18, 990 P.2d 689, 694 (App. 1999) (court of appeals would not consider issue not raised before the Industrial Commission); *Estate of Wesolowski v. Indus. Comm'n*, 192 Ariz. 326, ¶ 11, 965 P.2d 60, 63 (App. 1998) (affirmative defense not raised during hearing process waived);

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[1]By inserting this motion in his reply brief, Hypl has failed to comply with Rule 6, Ariz. R. Civ. App. P., 17B A.R.S., governing motions, and Rule 13(c), Ariz. R. Civ. App. P., 17B A.R.S., governing reply briefs. Nevertheless, we will address it here.

[2]The motion refers only to SCF and states that "SCF was never found to have been [Hypl's] employer." We assume Hypl intended to refer to CPS because SCF is a party to this case as an insurer, not as an employer.

Associated Grocers v. Indus. Comm'n, 133 Ariz. 421, 424, 652 P.2d 160, 163 (App. 1982) (issues raised for first time in reply brief waived).

¶7 Hypl next argues that the ALJ improperly based his decision in part on "a stipulation that did not exist." The ALJ is the trier of fact and determines the validity and enforceability of stipulations and agreements under contract principles. *Hartford v. Indus. Comm'n*, 178 Ariz. 106, 109, 870 P.2d 1202, 1205 (App. 1994). On review, this court views the evidence in the light most favorable to sustaining the award and will affirm if the award is supported by any reasonable theory of the evidence. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398-99, 542 P.2d 1096, 1097-98 (1975).

¶8 Hypl contends the parties never stipulated "that [Hypl's] injury did not arise out of and in the course of his employment when stopped by the police." But Hypl conflates two issues. The ALJ found that the parties had stipulated that Hypl "was not in the course and scope of employment when stopped by police." But he further found that the issue of whether Hypl was in the course of employment "*when injured*" would need to be "decided anew in view of" this court's opinion in *Hypl*. (Emphasis added.)

¶9 First, the critical issue to determining whether Hypl is entitled to benefits is whether Hypl had been in the course and scope of his employment at the time of his injury, not at the time he was stopped by police. *See* A.R.S. § 23-1021(A) (employee entitled to compensation for injury "arising out of and in the course of employment"); *see also Hypl*, 210 Ariz. 381, ¶ 6, 111 P.3d at 425. The ALJ did redetermine that issue. Hypl has not

explained how the ALJ's finding of the stipulation prejudiced him with regard to the critical issue. Moreover, the ALJ stated on review that removing that portion of the stipulation would not change his decision.

¶10 Second, the record supports the ALJ's finding regarding the stipulation. In a letter to the parties, the ALJ explained his prior rulings as follows:

> My Award did find that Mr. Hypl was an employee of Corexpress when he began his delivery on May 03, 2002, because of the additional indicia of control exercised for that trip. I also found he was not in the course and scope of his employment when later stopped by the police. Finally, I found the evidence did not establish he was in the course and scope of employment when the injury occurred or that the injury arose out of the employment. Obviously, the Court of Appeals has now ruled that the unexplained death presumption can be invoked under the proper time and space limitations, so this last issue would have to be revisited.

In the same letter, the ALJ informed the parties that they had the right to relitigate all issues anew, but if they wanted the case reassigned to him, he would decide the case on the evidence already presented, and his prior rulings would be binding except for the issue of whether Hypl was within the time and space limitations of his employment, so that the presumption applied. In a letter signed by counsel for SCF, Corexpress, and Hypl, the parties "agree[d] to [the] terms" of the ALJ's letter, "including the explanation of the effect of [the ALJ's] prior rulings." This evidence supports the ALJ's conclusion that the parties stipulated that Hypl was not in the course and scope of employment when stopped by police. *See Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 549, 711 P.2d 1207, 1222

(App. 1985) ("A stipulation is an agreement, admission or concession made in a judicial proceeding by the parties or their attorneys, in respect to some matter incident to the proceedings, ordinarily for the purpose of avoiding delay, trouble and expense."); *Ohlmaier v. Indus. Comm'n*, 161 Ariz. 113, 117, 776 P.2d 791, 795 (1989) (describing hearing before ALJ as "judicial"). Accordingly, we will not disturb the ALJ's ruling on the stipulation. *See Gamez v. Indus. Comm'n*, 213 Ariz. 314, ¶ 9, 141 P.3d 794, 795 (App. 2006) ("We deferentially review the ALJ's factual findings.").

¶11 Hypl also argues that his presentation of new evidence to the ALJ reopened litigation of all issues, relying on the statement in the ALJ's letter that "[i]ssues decided are the 'law of the case' only if no new evidence is presented." But he raises this argument for the first time in his reply brief, and it is therefore waived. *See Associated Grocers*, 133 Ariz. at 424, 652 P.2d at 163.

¶12 Hypl argues the evidence supported application of the presumption adopted in *Hypl*, and thus the ALJ erred in concluding the presumption did not apply. Again, we defer to the ALJ's factual findings and we must uphold the award if it is "supported by any reasonable theory of the evidence." *Gamez*, 213 Ariz. 314, ¶ 9, 141 P.3d at 795. Drawing inferences from the evidence is the exclusive province of the ALJ. *See Crystal Bottled Waters v. Indus. Comm'n*, 174 Ariz. 184, 187, 847 P.2d 1131, 1134 (App. 1993).

¶13 The ALJ concluded that Hypl was outside the time and space limitations of his employment because Hypl had ten hours to drive 350 miles, and when he was stopped

by police, he was "a significant distance from El Paso," had not yet delivered the wire, and was driving away from El Paso. He also found that the injury probably occurred "shortly . . . before or after 06:00 a.m.," the deadline for delivering his load. The ALJ drew reasonable inferences from this evidence. *See id.* And the evidence adequately supports the ALJ's conclusion that Hypl was not within the time and space limitations of employment when the injury occurred. Accordingly, we will not disturb that conclusion.[3] *See id.; Gamez*, 213 Ariz. 314, ¶ 9, 141 P.3d at 795.

¶14 Hypl contends our holding in *Hypl* required "substantial evidence of a departure from the employment," and that there was no such evidence in this case. But evidence of a departure from employment would only be necessary to rebut the presumption if it arose. *See Helton v. Indus. Comm'n*, 85 Ariz. 276, 279, 336 P.2d 852, 853 (1959) ("[A] presumption . . . vanishes upon the introduction of opposing evidence."). Here, Hypl bore the burden of proving that he had been injured within the time and space limitations of his employment, which would have entitled him to the presumption in the first place. *Hypl*, 210 Ariz. 381, ¶ 21, 111 P.3d at 430. The ALJ concluded the evidence was insufficient to give rise to the presumption, and the record supports that conclusion. Accordingly, we will not disturb it. *See Gamez*, 213 Ariz. 314, ¶ 9, 141 P.3d at 795.

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[3]We noted in *Hypl* that the ALJ originally "made findings of fact that could indicate he found Hypl had failed to satisfy the time and space limitations necessary to invoke the presumption." *Hypl*, 210 Ariz. 381, ¶ 22, 111 P.3d at 430. The ALJ's present findings are consistent with his original findings.

¶15 Hypl also contends the ALJ did not consider evidence supporting the conclusion that Hypl was within the time and space limitations of employment, including a police report, a telephone call "from the employer's representative," and the testimony of two physicians. Hypl also cites other evidence he claims supports the conclusion that he was within the time and space limitations of employment at the time of injury. But the ALJ stated in his decision that he "fully considered the files, records[,] and all matters" related to Hypl's case. As the trier of fact, it is the ALJ who weighs the evidence. *See Ohlmaier*, 161 Ariz. at 117, 776 P.2d at 795. We may not reweigh it. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, ¶ 21, 2 P.3d 691, 698 (App. 2000). Rather, even if there is conflicting evidence, once the ALJ resolves the conflict, this court must accept that resolution if it is supported by any reasonable theory of the evidence. *Greenlaw Jewelers v. Indus. Comm'n*, 127 Ariz. 362, 363, 621 P.2d 49, 50 (App. 1980). Therefore, we will not disturb the ALJ's decision on this basis.

¶16 Hypl also contends the ALJ ignored the "traveling employee" doctrine in reaching his decision. Under that doctrine, overnight traveling employees "remain within the course of employment continuously during their travel, even when eating and sleeping, except when a 'distinct departure on a personal errand' has occurred." *Bergmann Precision, Inc. v. Indus. Comm'n*, 199 Ariz. 164, ¶ 10, 15 P.3d 276, 278 (App. 2000), *quoting* 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 25.01, at 25-1 to 25-2 (2000). But in the traveling employee cases, there was sufficient evidence

to determine that the injury occurred in the time and space limitations of employment. *See id.* ¶¶ 2-6 (traveling salesman injured while crossing street after eating lunch); *Pottinger v. Indus. Comm'n*, 22 Ariz. App. 389, 390, 527 P.2d 1232, 1233 (1974) (insurance salesman burned while staying in hotel at own expense following conference); *Peterson v. Indus. Comm'n*, 16 Ariz. App. 41, 42, 490 P.2d 870, 871 (1971) (traveling salesman suffocated while sleeping in quarters paid for by employer). Here, as the ALJ concluded, "there [wa]s no evidence that [Hypl] was in the truck at the time of the injury or that he was even headed toward El Paso at the time of injury." (Emphasis in original.) Accordingly, the traveling employee doctrine does not help Hypl.

¶17 Hypl cites *Torres v. Industrial Commission*, 137 Ariz. 318, 670 P.2d 423 (App. 1983), for the proposition that an injury sustained while using employer-provided transportation is compensable. *Torres* involved the "going and coming" rule, which provides that employees are not in the course of employment when traveling to or from the employer's premises. 137 Ariz. at 320, 670 P.2d at 425. This court evaluated exceptions to that rule where the employer compensates for travel time or provides a means of transportation. *See id.* at 320-21, 670 P.2d at 425-26. But the employer conveyance exception discussed in *Torres* applies where the conveyance is used to travel to or from work and "the injur[y] occurred while using that conveyance." *Id.* at 321, 670 P.2d at 426. Here, the ALJ concluded Hypl had failed to present sufficient evidence that the injury occurred within the time and space limitations of employment and concluded there was no

evidence that the injury occurred while Hypl was in the truck. Accordingly, *Torres* does not help Hypl.

¶18 The ALJ found Hypl had failed to present sufficient evidence to prove by a preponderance of the evidence that he was within the time and space limitations of employment at the time of the injury. The ALJ's conclusion is supported by a "reasonable theory of the evidence," *Gamez*, 213 Ariz. 314, ¶ 9, 141 P.3d at 795; therefore we will not set aside the award.

¶19 For the foregoing reasons, we affirm the award.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge